In The

Supreme Court of the United States

No. 79-224

MICHAEL E. COLEMAN,

Petitioner,

vs.

GEORGE DARDEN, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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In The

Supreme Court of the United States

No.

MICHAEL E. COLEMAN,

Petitioner,

vs.

GEORGE DARDEN, Individually, and in his representative capacity as Regional Director of the Denver Litigation Center for the Equal Employment Opportunity Commission; ANNIE CLAY, Individually, and in her representative capacity as Administrative Officer for the Equal Employment Opportunity Commission; and JOHN FORD, Individually and in his representative capacity as Senior Research Analyst for the Equal Employment Opportunity Commission, ETHEL BENT WALSH, Individually and as Acting Chairman of the Equal Employment Opportunity Commission,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Michael E. Coleman, petitions for a Writ of Certiorari to

review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix B hereto. The Orders and Memorandum of the United States District Court for the District of Colorado appear in Appendix D and E hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 23, 1979, and appears in Appendix A hereto. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 19, 1979, and this Petition for Certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

1. Does 29 USC §791(b), and 5 CFR §713.401 (1976) (passed pursuant to 5 USC §715.3 (1970)) imply a private cause of action against federal agencies to redress wrongful physical handicap employment discrimination when no express cause of action nor administrative remedies are available?

2. Does the Rehabilitation Act's prohibitions on physical handicap discrimination define a class of persons enjoying fundamental rights of sufficient importance to bring them within the Fifth Amendment's prohibition on

irrebuttable presumptions and overbroad classifications and forbid disqualification decisions on the basis of physical handicap without an individualized determination?

3. Under 5 USC §702, (Administrative Procedure Act) as amended, when a person is aggrieved by a federal agency violating the prohibitions on handicap discrimination found in §791(b), is the proper standard for review the "arbitrary and capricious" standard, or that found in 5 USC §706(2)(b), whether the administrative action is"...in excess of statutory...limitations."?

STATEMENT

In September 1975, Petitioner was employed by the Equal Employment Opportunity Commission as a Law Clerk. Petitioner was notified he had not passed the Colorado Bar Examination. It was a policy and practice of the regional EEOC to give Law Clerks who did not pass the Bar first priority for "Research Analayst" (RA) positions (GS-11). In November, 1975, relying upon that policy and practice of priority, Petitioner applied for the RA position.

Petitioner met all of the RA job qualifications and was rated eligible. It was not a prerequisite that applicants for this RA position possess the ability to read. At the time of his application Petitioner was 29 years old and had been visually handicapped (blindness) since 1960. Petitioner, who is fluent in Spanish, French and German, won a law degree from the University of

Denver School of Law in 1974.

Petitioner was turned down by Respondents because he is blind and would require reader assistance. (See App. K,L & M). In fact Respondents in their Answer Brief in the Court of Appeals admitted Petitioner was "not found qualified for the position because of his lack of sight."

Petitioner was presumed unable to perform the duties because he is blind. In addition the Respondents rejected Petitioner because of the added "expense" of hiring a second person as a "reader". The Respondents produced no evidence that providing reader assistance was an undue hardship on the EEOC; in fact, the only evidence on that issue is that it was more expensive for the EEOC to hire the non-handicapped person who was ultimately selected for this position than it would have been to hire Petitioner and provide reader assistance. (App. J.)

Petitioner had previously performed satisfactorily for the EEOC as a Law Clerk (GS-11) and was provided reader assistance. He was hired for this former position by the past EEOC regional director, as was the one attorney hired by the Denver EEOC who is blind and is provided reader assistance. Neither the Respondent Director, nor any of the other Respondents, had ever recommended or hired any physically handicapped persons for employment with the EEOC at any time.

Petitioner's affidavits showed

that he could perform the duties of Research Analyst competently with the services of a reader. (App. G). One affidavit of a past EEOC director well acquainted with the various positions and Petitioner's job performance, states that Petitioner could also perform the job of "Paralegal Specialist", (PS) which was the new name given to the same RA job after Petitioner was rejected.

The person ultimately hired for the position of Research Analyst for which Petitioner applied did not have a law degree, nor any previous experience as a Law Clerk. This was significant since the RA job like that of Law Clerk, entailed researching and analyzing relevant case precedants and statistical data, as well as assessing the litigation potential of cases and assisting attorneys in litigation. In fact there is no evidence of any particular qualification possessed by the non-handicapped person ultimately hired which Petitioner did not meet or surpass. Petitioner was precluded from showing he could do the work in a more satisfactory manner because Respondents refused to consider Petitioner as he would perform with reader assistance.

Petitioner filed suit for injunctive relief, including back pay, claiming Respondents violated §791(b) of the Rehabilitation Act of 1973 and the due process clause of the Fifth Amendment.

On November 16, 1976 the District Court granted the Respondents' Motion

to Dismiss the Rehabilitation Act claim. The District Court ruled that 29 USC §701(8) and §791(b) does not imply a private cause of action against Federal agencies and that Title VII of the Civil Rights Act of 1964, as amended, 42 USC §2000(e) et seq.,affords no basis for relief from physical handicap discrimination. (App. D).

On January 17, 1977 the District Court entered an Order of Summary Judgment dismissing Petitioner's Fifth Amendment claim. The District Court concluded:

> "It is not arbitrary or capricious for a government agency to establish physical requirements which are job related and there can be no question here that visual acuity to enable the employee to read has a direct relationship to the job of assisting lawyers in the preparation of evidence and data in discrimination investigations." (App. E).

Petitioner appealed to the Tenth Circuit Court of Appeals and that Court affirmed the judgment of the District Court. The Appeals Court held: (1) that there was no implied cause of action against Federal agencies under 29 USC §794 and refused to even address the issue of whether there is an implied cause of action under 29 USC §791(b) and 5 CFR §713.401 which expressly apply to Federal agencies; (2) that Petitioner was not entitled to due process protections from irrebuttable presumptions and overbroad classifications because Petitioner was not exercising fundamental constitutional rights; and (3) that under the APA (5 USC

§702, as amended) the proper standard of review was limited to whether the Respondents' action was "arbitrary and capricious."

Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 17, 1979. (App. C).

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS REFUSING TO IMPLY A PRIVATE CAUSE OF ACTION FOR HANDICAP DISCRIMINATION AGAINST FEDERAL AGENCIES CONFLICTS WITH THE HOLDING AND REASONING OF THIS COURT IN CORT, et al v. ASH, 422 U.S. 66 (1975).

The question is whether a private remedy to redress a violation of §791(b) and/or 5 CFR §713.401(1976) should be implied by the courts when no express remedy, sanction, or administrative procedure is otherwise provided by Congress.[1] Section §701(8) reads:

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[1] After Petitioner's rejection Congress amended Title VII to make it applicable to §791(b) cases. The District Court and the EEOC were correct, however, in finding no investigatory jurisdiction or cause of action under Title VII for discrimination on the basis of physical handicap at the time of Petitioner's rejection.

"The purpose of this chapter is... ...to authorize programs to...

(8) promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment..."

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[1]Continued

Congress' act of amending Title VII to include physical handicap discrimination underscores Congress' intent to implement more fully the Congressional anti-discimination intent in the Act and to provide an administrative investigatory procedure. An additional and more immediate objective of those Title VII amendments is to eliminate private discrimination which is not now regulated in the Rehabilitation Act. As Congressman Dodd testified before the Oversight Hearings on the Rehabilitation Act in the Ninety-Fourth Congress:

"However, we must go beyond the protections afforded the handicapped in the Rehabilitation Act and prohibit private discrimination in the areas of employment, architectural barriers, housing and transportation."

Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, United States Senate, 94th Cong., 2d Sess., pt. 2, 321-22 (1976).

Thus, Petitioner was without explicit judicial or administrative relief when Petitioner was rejected by Respondents. Congress only later, after

Under §791(b) each federal agency in the executive branch is required to submit an affirmative action plan to provide for the "hiring, placement, and advancement of handicapped individuals." §791(b) also requires that such a plan "include a description of the extent to which, and methods whereby the special needs of handicapped employees are being met."[2]

In addition to §791(b), the Civil Service Commission promulgated 5 CFR §713.401 (1976) (pursuant to 5 USC §7153 (1970)) (sometimes referred to as the "Regulation") which reads:

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[1]Continued
Petitioner's case had been rejected by the District Court, provided an administrative procedure under Title VII and extended its anti-discrimination policy to the private sector.

[2] It is now settled that §791(b) places affirmative action obligations on federal agencies to meet the special needs of the handicapped, including reasonable accommodations for qualified individuals. Southeastern Community College v. Davis, U.S. Supreme Court, No. 78-711, 47 L.W. 4689, 4692, June 11, 1979. In making this commitment to reasonable accommodations more specific, Congress has recently authorized heads of federal agencies to provide readers for blind employees at government expense. See §302, Civil Service Reform Act of 1978 (Pub.L. 95-454). See also

> "(a) In appointments and position changes. In determining the merit and fitness of a person for competitive appointment or appointment by noncompetitive service, the appointing officer shall not discriminate...on the basis of physical handicap with respect to any position the duties of which may be efficiently perfomed by a person with the physical handicap." (Emphasis added).

In Cort, et al v. Ash, 422 U.S. 66 (1975) this Court promulgated a four (4) prong test which must be followed in order to determine whether a private individual remedy is implicit in a statute not expressly authorizing one. Those four prongs are:

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[2]Continued
Federal Personnel Manual Letter 306-14 (December 29, 1978). The decision to reject Petitioner was made before the passage of these specific rules relating to "readers" found in Civil Service Reform Act of 1978. But §791(b)'s affirmative action and reasonable accommodation requirements were in effect when Petitioner was rejected. Moreover, Respondents made no showing whatsoever that providing Petitioner with a reader would be an "undue hardship" on the EEOC.

"(1) Is the Plaintiff one of the class for whose special benefit the statute was enacted;

(2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one;

(3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for Plaintiff; and

(4) Is the cause of action traditionally one relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law."

When §791(b) is analyzed in conjunction with 5 CFR §713.401 (1976) it is clear that a private cause of action is implicit under the four part Ash test.

First, blindness or visual handicap is clearly among the class of "physical handicap" and "handicapped individual" referred to in both §791(b) and the Regulation. See 29 USC §706(b).

Second, there is no explicit or implicit language in §791(b) indicating it was the intent of Congress to bar a private caue of action. In fact the mandatory language of the Regulation suggests both Congress and the Executive Branch expected that the bar on handicap employment discrimination by federal agencies would have the force of law.

Thirdly, the underlying purposes of the Act are furthered by a private cause of action. §701(8) states that one purpose of the Act is to "place such individuals [handicapped] in employment." Moreover, the Regulation's specific prohibition that appointment officers for federal agencies shall not discriminate on the "basis of physical handicap" is clearly furthered by an implied cause of action.

Finally, because this is a federal agency, it is not within the state's constitutional power or jurisdiction to enforce local anti-discrimination laws against federal officials and federal law is the only available source for a cause of action in this case.

The Rehabilitation Act as a whole constitutes a civil rights scheme wherein "federal agencies" are regulated in §791, "federal contractors" are regulated in §793 and "federally assisted programs" are regulated in §794. The legislative history wherein §§791, 793, and 794 were discussed concurrently supports the view that the Act must be considered as an interrelated and integrated civil rights scheme.

It is, therefore, of special significance that other courts which have decided this issue as it applies to other sections of the Rehabilitation Act have unanimously found a private cause of action implied. In Drennon v. Philadelphia General Hospital, 428

F.Supp. 809 (E.D.Pa. 1977) the court implied a cause of action under §793. To hold the general affirmative action language of §793 implies a private remedy while similar affirmative action language comprising §791(b) does not, means that federal agencies, departments and instrumentalies can continue their practice of discriminatory action forbidden by the Act while federal contractors are held by a Court to compliance. This contradicts the comments by the Chairman of the Senate Committee on Labor and Public Welfare that:

> "one important purpose of (§791(b) is:
>
> > "To require the Federal government itself act as the model employer of the handicapped and take affirmative action to hire and promote the disabled,..."

Likewise, implying a cause of action under §791(b) follows from the near unaniminity of Courts which have implied a cause of action under §794. See Kampmeier v. Nyquist, 553 F.2d 296 (2nd Cir. 1977); Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977); Duran v. City of Tampa, 430 F.Supp. 75 (M.D.Fla. 1977); Bartels v. Biernat, 427 F.Supp. 226 (E.D. Wis. 1977); Drennon v. Philadelphia General Hospital, supra; Hairston v. Drosick, 423 F.Supp. 180 (S.D.W.Va. 1976); and Sites v. McKenzie, 423 F.Supp. 1190 (N.D.W.Va. 1976).

Other courts have held that 5 CFR

§713.401 (1976) by itself implies a private cause of action against federal agencies. See Smith v. Fletcher, 343 F.Supp. 1366 (S.D. Tex. 1975); and McNutt v. Hills, 426 F.Supp. 990 (D.D. C. 1977).

This Court should take cognizance of the "familiar canon of statutory interpretation that remedial legislation should be construed broadly to effectuate its purposes." Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). The court should imply a cause of action which will increase the likelihood of compliance with the statute. See, Note, Implying Civil Remedies From Federal Regulatory Statutes,77 Harv.L. Rev. 285, 291 (1963).

"It is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." J.I. Case Co. v. Borak, 377 U.S. 426 (1964), cited with approval in Cort, et al v. Ash, supra, at p.84. And "it is not uncommon for federal courts to fashion federal laws where federal rights are concerned." Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 457 (1957). Under the "broad remedial purposes" of the Act it is entirely consistent with the legislative scheme to imply a private cause of action under §791(b) for the benefit of handicapped individuals.

As this Court said in Texas & Pacific Railway Co. v. Rigsby, 241 U.S. 33 (1916):

"A disregard of the command of this statute is a wrongful act, and when it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover the damges from the party in default is implied..."
241 U.S. at 39.

2. IN THE REHABILITATION ACT CONGRESS HAS DEFINED AND PROTECTED A FUNDAMENTAL AND IMPORTANT RIGHT TO BE FREE FROM HANDICAP DISCRIMINATION AND, AS A RESULT, THE PHYSICALLY HANDICAPPED ARE PROTECTED BY THE FIFTH AMENDMENT FROM THE USE OF IRREBUTTABLE PRESUMPTIONS AND OVERBROAD CLASSIFICATIONS AND THE DECISION OF THE COURT OF APPEALS TO THE CONTRARY CONFLICTS WITH THE HOLDING AND REASONING OF THIS COURT IN CLEVELAND BOARD OF EDUCATION v. LAFLEUR, 414 U.S. 632 (1974).

Affidavits of Respondents state Petitioner was disqualified because he is blind and would require reader assistance. (App. K,L & M). Respondents conceded in their Answer Brief in the Court of Appeals that Petitioner was found "not qualified for the position because of his lack of sight." Moreover, affidavits filed by Petitioner establish that Petitioner was better qualified in all other respects than the non-handicapped person ultimately hired to fill this position. (App. G &

J).

Based upon the facts and factual inferences viewed most favorable to Petitioner it is clear Petitioner was presumed unable to perform because of his visual handicap and was not given a chance to show he was otherwise qualified and could perform the duties required as competently, if not more so, than non-handicapped applicants. It is undisputed that Petitioner was not given an individual opportunity to overcome the categorical, class based presumption that he was disqualified because of his physical handicap. While the original position for which Petitioner applied did not explicitly exclude the physically handicapped (even though Respondents used Petitioner's handicap as a per se exclusion), the position as later described (Paralegal Specialist) explicitly excluded the visually handicapped from consideration and one Respondent stated in her affidavit that this was a basis for her refusal of Petitioner's application. (App. L). Thus, under both Respondents' own criteria and, later, the explicit job requirements Petitioner was subjected to a categorical, overbroad rule of exclusion because he is a member of a class of persons who are visually handicapped.

Claiming Weinberger et al, v. Salfi et al, 422 U.S. 749 (1975) as authority the Court of Appeals contends that due process does not afford Petitioner the right to show that in his case the presumption of disqualification is not warranted because Petitioner,

unlike the plaintiffs in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) is not asserting the violation of an independent constitutional right. The Petitioner contends the Court of Appeals has misread and misinterpreted the scope of both Salfi and LaFleur and that Petitioner was not afforded the process due under the Fifth Amendment.

In LaFleur this Court held that penalties imposed on individuals on the basis of characteristics or choices directly affecting the "basic civil liberties" of man must not needlessly, arbitrarily or capriciously be infringed. In LaFleur this Court found the mandatory termination of pregnant teachers to offend due process as it amounted to a "conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor as to any particular teachers ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical state may be wholly to the contrary." 414 U.S. at 644.

Similarly, Respondents have conclusively presumed Petitioner, like all other blind applicants, is physically incapable of performing the duties required. There was no individualized determination that Petitioner himself was unable to do the work, and Petitioner's affidavits clearly establish at least a prima facie case that the general rule of disqualification is not true for this particular handicapped person.

The Court of Appeals has read Salfi, however, as confining the reach of LaFleur to extend only to liberties afforded independent constitutional status, and rejects Petitioner's claim because protecting the physically handicapped from governmental discrimination does not have such status. Petitioner contends neither LaFleur nor Salfi should be read so narrowly. Instead, Petitioner is a member of a class given special recognition and protection by Congress in the Rehabilitation Act making the right to be free from physical handicap discrimination fundamental and entitled to the same due process consideration as rights recognized by this Court as being fundamental.

Neither Salfi nor LaFleur conines those fundamental liberties entitled to due process protection to liberties discovered by this Court in the porcess of constitutional adjudication. Congress may also give definition to the fundamental values of this society. This Court has often observed that Congress' judgment is given great weight in determining and shaping Constitutional doctrine. See Oregon v. Mitchell, 400 U.S. 112, 351-53 (1970); and Katzenbach v. Morgan, 384 U.S. 641 (1966). Petitioner contends that Congress, by affording the physically handicapped special status and a statutory right to be free from discrimina-

tion, has articulated a right fundamental enough to be afforded the same due process treatment as was pregnancy in LaFlueur. In fact this Court recently recognized that one consequence of anti- discrimination legislation, even though the Constitution may not require the same governmental restraints in the absence of such legislation, was to confer a right of individual consideration on members of the protected class and to ban categorical rules of disqualification. City of Los Angeles, et al v. Manhart, et al, 435 U.S. 702 (1978).

Other courts have recognized that the Rehabilitation Act creates fundamental rights entitled to protection from irrebuttable presumptions and overbroad classifications. In Gurmankin v. Costanzo, 556 F.2d 154 (3rd Cir. 1977) the Court of Appeals invalidated the categorical disqualification of blind teachers on grounds that the Fifth Amendment protected the blind from irrebuttable presumptions and afforded them an individual opportunity to show they could overcome the handicap and perform the duties as effectively as a non-handicapped applicant. See also Drennon v. Philadelphia General Hospital, supra, and Duran v. City of Tampa, supra. Surely, in giving definition to the right to be free from unjustified handicap discrimination Congress has recognized a right as fundamental and important as the right to bear children and clearly more fundamental and important than property

claims to non-contractual disability payments held insufficient in Salfi.[3]

3. THE DECISION OF THE COURT OF APPEALS IS CLEARLY INCONSISTENT WITH AND CONTRARY TO THE PLAIN LANGUAGE AND CONGRESSIONAL INTENT OF THE ADMINSTRATIVE PROCEDURE ACT, 5 USC §702 AND §703, AS AMENDED

The Court of appeals found that in the absence of a cause of action under the Rehabilitation Act, the Petitioner's claim was within the scope of the APA, 5 USC §702 and §703, as amended. 5 USC § 702, as amended, reads in relevant part:

§702 Right of Review

" A person suffering legal wrong

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[3] Petitioner's Fifth Amendment claim was also rejected by the Court of Appeals on the grounds that Petitioner had no property right to employment. This obviously misperceives the issue. Petitioner's claim is that his "liberty" interest to be free from handicap discrimination was violated without due process, not his interest in property. This Court in LaFleur recognized that the issue is one of whether a person's "liberty" has been deprived in applying the conclusive presumption doctrine. It is not the form of the penalty, but the right which is burdened, which raises the due process issue. See Duran v. City of Tampa, supra.

In any event, Petitioner's own

because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof..."

5 USC §703, as amended, reads:

§703 Form and venue of proceeding "...If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is

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[3]Continued
Affidavit, as well as that of Georgia Guilfoil, states that the EEOC had a policy of giving EEOC Law Clerks who did not pass the Bar first priority for available Research Analyst positions. The District Court explicitly found the existence of such a policy of priority. (App. D). Thus, even if a reasonable expectation of employment were a prerequisite, the facts as found by the District Court satisfy such a prerequisite. Such a policy of priority consideration would provide a reasonable basis for Petitioner's expectation of employment as a Research Analyst and undercuts the Court of Appeal's conclusion that Petitioner had nothing more than a "unilateral expectation" of a job.

subject to judicial review in civil or criminal proceedings for judicial enforcement."

Assuming, arguendo, that there is no implied private cause of action under §791(b), Petitioner agrees with the Court of Appeals that the amended APA provides Petitioner with a cause of action in this case. See McNutt v Hills, 426 F.Supp. 990 (D.C.C. 1977).

The Court of Appeals, however, held that the standard for reviewing Petitioner's claim under the APA was whether or not the Respondent's acts were "arbitrary and capricious." This is an imprecise and incorrect interpretation of the APA and if allowed to stand invites courts to disregard other more specific standards of review which apply to claims of specific statutory infractions by federal officials.

Petitioner's claim is not a claim of a generally unfair administrative decision. Petitioner instead claims that these Respondents violated his specific statutory rights to be free from physical handicap discrimination in Federal employment. That is, the Respondents acted in violation of §791(b) and 5 CFR §713.401 (1976). Accordingly, 5 USC §702 and §703 as amended, provide Petitioner with a cause of action to vindicate rights created by the Rehabilitation Act where that same Act does not expressly provide a cause of action for its own violation.

The APA specifically establishes a separate standard of review when the

individual is claiming he was the victim of agency action "...in excess of statutory... limitations." 5 USC §706(2)(b) reads in relevant part:

> §706. Scope of review
> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall---
> (1) ....
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be---
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (emphasis added)
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to §556 and §557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts

> are subject to trial de novo by the reviewing court.

Courts have recognized that these standards of review under the APA are independent alternatives and that the "or" preceeding the last standard clearly indicates that Courts may set aside agency action when it is "arbitrary and capricious" or "in excess of statutory limitation." See Schicke v. Romney, 474 F.2d 309 (2nd Cir. 1973); and Albert Elia Bldg. Co. Inc. v. Sioux City, Ia., 418 F.Supp. 176 (N.D.Ia. 1976).

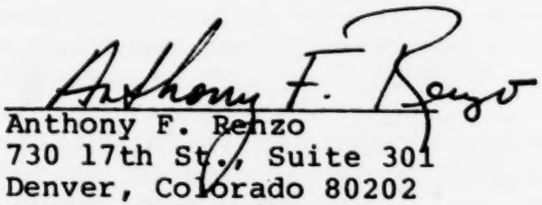
The Court of Appeals rejected Petitioner's claim under the APA because he failed to meet the "arbitrary and capricious" standard of review. Petitioner, however, clearly produced facts in opposition to Respondents' summary judgment motion, which, if believed, establish a violation of §791(b), see supra, Part 1. Thus, Petitioner was deprived of his day in court because the Court of Appeals incorrectly applied the more permissive "arbitrary and capricious" standard and did not limit its inquiry to determining whether Petitioner's facts, if believed, establish that Respondents' were acting in excess of the specific limitations on physical handicap discrimination found in the Rehabilitation Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully sumitted,

ENGDAHL, RENZO & REED, P.C.



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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JANUARY TERM - February 23, 1979

Before the Honorable Oliver Seth, The Honorable James K. Logan, Circuit Judges, The Honorable H. Dale Cook, District Judge

MICHAEL E. COLEMAN, Plaintiff-Appellant, vs. GEORGE DARDEN, Individually, and in his representative capacity as Regional Director of the Denver Litigation Center for the Equal Employment Opportunity Commission; ANNIE CLAY, Individually and in her representative capacity as Administrative Officer for the Equal Employment Opportunity Commission; and JOHN FORD, Individually and in his representative capacity as Senior	No. 77-1133 (D.C. No. 76-M-686)

Research Analyst for)
the Equal Employment)
Opportunity Commis-)
sion, ETHEL BENT)
WALSH, Individually)
and as Acting Chair-)
man of the Equal)
Employment Opportun-)
ity Commission,)
)
Defendants,)
Appellees.)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was signed by counsel.

Upon consideration whereof, it is ordered that the judgment of that Court is affirmed.

HOWARD K. PHILLIPS, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 77-1133

MICHAEL E. COLEMAN,)
)
Plaintiff-)
Appellant,)
)
vs.)
)
GEORGE DARDEN,)
Individually, and in)
his representative)
capacity as Regional)
Director of the)
Denver Litigation)
Center for the Equal)
Employment Opportun-)
ity Commission;)
ANNIE CLAY,)
Individually and in)
her representative)
capacity as Adminis-)
trative Officer for)
the Equal Employ-)
ment Opportunity)
Commission; and)
JOHN FORD, Individ-)
ually and in his)
representative capa-)
city as Senior)
Research Analyst for)
the Equal Employment)

Appeal From The United States District Court For The District Of Colorado No. 76-M-686

Opportunity Commission, ETHEL BENT WALSH, Individually and as Acting Chairman of the Equal Employment Opportunity Commission,

Defendants, Appellees.

Anthony F. Renzo of Engdahl, Renzo & Reed, P.C., Denver, Colorado, for Plaintiff- Appellant.

Abner W. Sibel, General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Assistant General Counsel, Sharyn Danch, Attorney, Equal Employment Opportunity Commission, Washington, D.C., for Defendants-Appellees.

Before SETH and LOGAN, Circuit Judges, and COOK, District Judge*.

COOK, District Judge.

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* Of the Northern, Eastern and Western Districts of Oklahoma, sitting by Designation.

This case is before us on appeal from a final order of the United States District Court for the District of Colorado granting summary judgment in favor of the defendants-appellees (hereinafter referred to as "defendants"). In his complaint, the plaintiff-appellant, Michael E. Coleman (Coleman), alleged, inter alia, that the defendants had discriminated against him because of a physical handicap in violation of the Rehabilitation Act of 1973, 29 U.S.C. §791 et seq. and the Fifth Amendment to the United States Constitution. He sought review of the defendants' actions under those provisions and also under the Administrative Procedure Act, 5 U.S.C. §701 et seq. The District Court entered judgment in behalf of the defendants, holding that the Rehabilitation Act of 1973 did not create an implied private cause of action and that the undisputed facts did not demonstrate a violation of Coleman's Fifth Amendment Rights. This appeal followed.

At the time of the acts complained of, Coleman was a twenty-nine (29) year-old white male who became totally blind in 1960. Despite this handicap, he received an under-graduate degree from Louisiana State University in 1970 and a law degree from the University of Denver in 1974. From January 1, 1974 to January 1, 1975, Coleman was employed as a part-time case analyst by the Denver Regional Office of the General Counsel, Equal Employment Opportunity Commission (EEOC). Beginning on January 1, 1975, Coleman became a law clerk in the same office. In both positions, he was provided the services of a part-

time reader, and his performance was entirely satisfactory. At the time he accepted the law clerk position, Coleman understood that he would be terminated if he was not admitted to the bar within fourteen (14) months. He did not gain the requisite bar admission and was terminated on March 1, 1976. The appropriateness of that termination has not been challenged.

In November of 1975, anticipating his termination, Coleman applied for a position as a research analyst in the Denver office of the EEOC. He was one of seven applicants whose names were referred to the Denver office for consideration. Defendants Clay and Ford were assigned the task of reviewing the applications and filling the position. They did not hire Coleman, choosing instead a female applicant who is not visually handicapped. Coleman filed a grievance with the EEOC but was advised that because there was no established procedure for handling grievances based upon handicap discrimination, his complaint would not be investigated. Following his unsuccessful attempt to proceed administratively, Coleman filed this suit in the District Court.

In view of the issues raised in this appeal, it is necessary to examine the primary duties and responsibilities of the jobs in issue, as set forth in the applicable position descriptions. The position of law clerk, from which Coleman was terminated for failure to gain admission to the bar, included the following duties and responsibilities: Preparing drafts of opinion letters

involving interpretations of Title VII; reviewing contracts for legal sufficiency; providing legal counsel and assistance in the preparation of briefs; drafting administrative regulations and examining regulations for conformance with the requirements of Title VII. (R.135-139)

The position description for research analyst, the job for which Coleman was not selected, reveals the following duties and responsibilities, among others: assisting in the analysis of the litigative potential of cases; researching and analyzing relevant case precedents and statistical and socio-economic data; reviewing and preparing material required to aid the attorney in litigating cases; developing work sheets for compilation of statistical data; interpreting computer formats and printouts; compiling and analyzing labor force data; evaluating seniority systems and testing patterns; assisting in the preparation of materials required for discovery and aiding in the preparation of remedial orders. (R.48-53)

There is a third position which, although not directly in issue here, is relevant in view of the claims made by Coleman. That position is paralegal specialist, the duties and responsibilities of which included the following: researching and analyzing legal decisions; compiling substantive information on statutes and legal instruments; preparing cases for civil litigation, including the collection, analysis and evaluation of evidence; analyzing facts and legal questions presented by personnel administering specific Federal laws and perfor-

ming other paralegal duties requiring discretion and independent judgment in the application of specialized knowledge of particular laws. (R.92-93) The position description for paralegal specialist also contained the following physical requirement: "Ability to read without strain printed material the size of typewritten characters is required, corrective lenses permitted." (R.96) Neither the law clerk posiiton nor the research analyst position specifically required the ability to read. In March of 1976, after the research analyst position in issue had been filled, that position was reclassified as a paralegal specialist position. The two positions thereby became one, and the position description became the same as that of the former research analyst. (R.130-134)

In assessing motions for summary judgment, we must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues, Stevens v. Barnard, 512 F.2d 876 (10th Cir. 1975), and pleadings and other documentary evidence must be construed liberally in favor of the party opposing the motion. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); Webb v. Allstate Insurance Co., 536 F.2d 336 (10th Cir. 1976); Stevens v. Barnard, supra. The burden is upon the moving party to show, beyond a reasonable doubt, the absence of a genuine issue as to any material fact. Adickes v. S.H. Kress & Co., supra; Mogle v. Sevier County School District, 540 F.2d 478 (10th Cir. 1976); Stevens

v. Barnard, supra. However, under Rule 56(e) of the Federal Rules of Civil Procedure, once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. Adickes v. S.H. Kress & Co., supra; First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), rehearing denied 393 U.S. 901 (1968); Brown v. Ford Motor Company, 494 F.2d 418 (10th Cir. 1974).

FIFTH AMENDMENT CLAIM

Coleman contends that the defendants deprived him of his rights to due process under the Fifth Amendment by creating an irrebuttable, or conclusive, presumption that he could not satisfactorily perform the job of research analyst because of his physical handicap. He claims that he could have performed the job with the assistance of a reader and that because of his previous satisfactory performance, he should have been given the opportunity to demonstrate his ability to perform the job of research analyst.

Statutes creating permanent irrebuttable persumptions, which are neither necessarily nor universally true, are disfavored under both the Fifth and Fourteenth Amendments, because they preclude individualized determination of the facts upon which substantial

rights or obligations may depend. Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 22390, 37 L.Ed.2d 63 (1973). For instance, in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), the Supreme Court invalidated a school board rule which presumed a pregnant teacher physically incapable of teaching for several months before and after the birth of her child; Vlandis v. Kline, supra, involved a statutory presumption of residency for purposes of college tuition; Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), involved a statute which presumed an unwed father unfit to raise his own children. We believe that Coleman's claim based upon the doctrine of conclusive presumptions fails for several reasons.

As noted above, the primary evil of conclusive, or irrebuttable, presumptions is their failure to provide an opportunity for an individualized determination of the relevant facts. In support of their motion for summary judgment, the defendants submitted affidavits from the person responsible for filling the research analyst position. Those affidavits reveal that Coleman's name was among seven referred to the Denver office for consideration for that position. (R.46) The selection panel had before it Coleman's application, (R.120-121) which did not reveal his visual handicap, and his latest performance evaluation. (R.81; 87) The panel discussed and considered the strengths and weaknesses of each candidate before making its selection.

(R.116) In opposition to those affidavits, Coleman relied upon the allegations in his complaint that the defendants disqualified him from any consideration for the position because of his visual handicap. However, in view of the affidavits filed by the defendants, those allegations were insufficient to raise a factual issue. The unrebutted evidence is that Coleman's application was given the individual consideration lacking in the ordinary conclusive presumption situation.

Furthermore, cases invalidating conclusive presumptions, including those cases relied upon by Coleman, have done so in the context of a statute (Vlandis v. Kline, supra; Stanley v. Illinois, supra; Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932); Schlesinger v. Wisconsin, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557 (1926), a policy (Gurmankin v. Costanzo, 556 F.2d 184 (3rd Cir. 1977); Duran v. City of Tampa, 430 F. Supp. 75 (M.D.Fla. 1977), a rule (Cleveland Board of Education v. LaFleur, supra), or a constitutional provision (Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) applicable to a designated, identifiable class of persons. There is no evidence in the record of this case, and, in fact, no allegations in the complaint, that the defendants excluded blind persons as a class from consideration for the position of research analyst, or for any other position, or that any statute, policy or rule operated to exclude that class of persons. Coleman alleges only that he was personally and

individually excluded from consideration because of his visual handicap.

Even if the facts of this case might otherwise justify the application of the concept of irrebuttable presumption, the opinion of the United States Supreme Court in Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), indicates that the nature of Coleman's interest might render the Court inapplicable in this case. In Salfi, which involved a statutory presumption under the Social Security Act, the Court found that the social welfare programs involved did not ". . . involve affirmative Government action which seriously curtails important liberties cognizable under the Constitution," 422 U.S. at 749, and that the presumption was rationally related to a legitimate legislative goal. The Court held that, under the circumstances, no individualized determinations were necessary and distinguished the situation before it from that present in Stanley v. Illinois, supra, in which the Court had characterized the rights to conceive and raise one's children as basic civil rights of man and as" . . . rights far more precious . . . than property rights." 405 U.S. at 645. The interest of the plaintiff in this case is closer to a property right than to one of the "important liberties cognizable under the Constitution," and the conclusive presumption doctrine might well be inapplicable to the facts of this case. See Mogle v. Sevier County School District, supra, in which this Court rejected a conclusive presumption argument in an employment situation somewhat similar

to the one present in this case.

In conclusion, we do not believe that the conclusive presumption doctrine was intended to apply to a factual situation of the type now before us. Whenever a person seeking employment is rejected on the basis of an application, there is necessarily a "presumption" that he would be unable to perform the job as satisfactorily as the person hired. Such an unsuccessful applicant could always contend that he should be permitted an opportunity to prove that he could adequately perform the job, despite his apparent lack of qualifications. Merely because such "presumptions" are a fact of business life does not mean that "trial periods" should be required for all, or even all handicapped applicants, and certainly not if an applicant's qualifications are individually considered in relation to legitimate job requirements. The undisputed evidence in this case is that Coleman was given such individual consideration.

Aside from the inapplicability of the conclusive presumption doctrine, we do not feel that Coleman's interest rises to the level of that protected by the Fifth Amendment. The requirements of procedural due process apply only to the deprivation of those liberty and property interests encompassed by the Fifth and Fourteenth Amendments. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). There is no constitutionally protected right to government employment. Talbot v. Pyke, 533 F.2d 331 (6th Cir. 1976); Orr v. Trinter, 444 F.2d 128 (6th Cir.

1971), cert. denied 408 U.S. 943 (1972).

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, supra, 408 U.S. at 577. Coleman has not demonstrated any legitimate claim of entitlement to the job of research analyst, and it is difficult for us to imagine how he could have done so. The record before us clearly indicates that his interest in that particular job was in the nature of a "unilateral expectation" or an "abstract need or desire." In Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), the Supreme Court refused to extend Fifth Amendment protection to one whose employment was effectively terminated by the actions of the United States Government and whose property interest was therefore far more significant than Coleman's. The petitioner in that case had been employed on a military installation by a private restaurant under contract with the Federal government. The commanding officer of the installation revoked the petitioner's right to enter the premises for failure to meet the security requirements. The petitioner contended that she had been denied due process under the Fifth Amendment. The Court found that her interest was not the right to follow a

chosen trade or profession and that she was entirely free to obtain any type of job with any employer; "[a]ll that was denied her was the opportunity to work at one isolated and specific military installation." Id., 367 U.S. at 896. The Court also noted that the government's action had not operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity. Finding that the case involved the Federal government's dispatch of its own internal affairs, the Court rejected the petitioner's Fifth Amendment claims. The reasoning of that case is equally applicable to the action of the government in the case before us. Coleman has not been deprived of any rights protected by the Fifth Amendment.

STATUTORY CLAIMS

Coleman appeals from the District Court's conclusion that no private cause of action can be implied from the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq., and specifically from 29 U.S.C. §794. That section provides as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Every Circuit Court of Appeals which has addressed the issue has held that a private cause of action can be implied from the statute against the proper defendants. See Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2nd Cir. 1977); Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977). Assuming that such a cause of action might be implied under certain circumstances, we do not believe that a Federal agency can be considered a "program or activity receiving Federal financial assistance" under §794. See Federal Employees for Non-Smokers' Rights (FENSR) v. United States, 446 F.Supp. 181 (D.D.C. 1978). Federal agencies are specifically covered by the affirmative action program requirements of 29 U.S.C. § 791(b). The regulations enacted under § 794 define "recipient" and "Federal financial assistance" in terms which, when rationally construed, do not apply to Federal agencies. 45 C.F.R. § 84.3. Accordingly, we conclude that, under the circumstances of this case, the District Court was correct in refusing to recognize an implied private cause of action against these defendants under 29 U.S.C. § 794.

Coleman also contends that he has a right to judicial review of the defendant's actions under the Administrative Procedure Act, 5 U.S.C. §701 et seq. Some Federal courts have permitted persons claiming Federal handicap discrimination to seek judicial review of

Federal agency action under 5 U.S.C. §702, Ryan v. Federal Deposit Insurance Corporation, 565 F.2d 762 (D.C. Cir. 1977); McNutt v. Hills, 426 F. Supp. 990 (D.D.C. 1977); Smith v. Fletcher, 393 F.Supp. 1366 (S.D. Tex. 1975), aff'd 559 F.2d 1014 (5th Cir. 1977), and at oral argument, the defendants conceded Coleman's right to bring a cause of action for judicial review under that statute. Under the applicable standard of review, the agency's action can be set aside only if it is "arbitrary and capricious." 5 U.S.C. §706(2)(A); McNutt v. Hills, supra.

> Review under this provision of the A.P.A. provokes inquiry whether the administrative decisions were based on a consideration of all the relevant factors and whether there was a clear error of judgment. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency. Id. The Court's function is exhausted where a rational basis is found for the agency action taken.

Sabin v. Butz, 515 F.2d 1061, 1067 (10th Cir. 1975). Before administrative action will be set aside as arbitrary

and capricious, the party challenging the action must prove that it was willful and unreasoning action, without consideration and in disregard of the facts and circumstances of the case. First National Bank of Fayetteville v. Smith, 508 F.2d 1371 (8th Cir. 1974), cert. denied 421 U.S. 930 (1975).

In the area of federal regulation of government employees, the governmental employer has virtually uncontrolled latitude in decisions as to hiring and firing, so long as its actions are lawful and rationally based. United States v. Testan, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); Cafeteria & Restaurant Workers Union v. McElroy, supra. As the Supreme Court said in Keim v. United States, 177 U.S. 290 at 292, 20 S.Ct. 574, 44 L.Ed. 774 (1900):

> The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

See also Bookman v. United States, 453

F.2d 1263 (Ct.Cl. 1972). In view of the wide discretion possessed by a Federal agency and the narrow scope of review of its actions, a person challenging a Federal employment decision such as the one now before us faces a difficult task indeed. On the record now before us, we believe that the District Court was correct in refusing to substitute its judgment for that of the Federal agency.

As previously noted, the defendants considered Coleman for the position of research analyst on the basis of his application and performance evaluation and considered his strengths and weaknesses along with those of the other candidates. The research analyst position was in the competitive service. Therefore, it was necessary that the person selected to fill that position have Civil Service status or, after selection, receive certification from the Civil Service Commission. At the time of his application, Coleman did not have the required status, and the defendants were advised that his certification could not be guaranteed. The person ultimately selected to fill the position had Civil Service status at the time of her appointment. (R.47) A comparison of the job descriptions for the positions of law clerk, research analyst and paralegal specialist reveals that the duties of a law clerk were more similar to those of paralegal specialist than to those of research analyst in that both the law clerk and the paralegal specialist were required to analyze cases and give advice requiring a knowledge of laws and legal

theories, while the duties of the research analyst were more in the nature of evidence preparation and data interpretation. Coleman admits that the ability to read was a reasonable requirement for the position of paralegal specialist. The defendants provided readers for visually handicapped persons in the positions of law clerk and staff attorney, who have specialized training and skills not possessed by the ordinary reader, but they concluded that in the case of a research analyst, the duties would be performed by the reader and not by the visually handicapped person. (R.116) That conclusion seems reasonable in light of the announced duties of the position. Coleman seems to argue that because the ability to read was not specifically listed as a requirement for the job of research analyst, such ability could not be considered as a factor in his qualifications. We do not believe that the discretion of a Federal agency regarding the qualifications of applicants for employment can be so narrowly confined. Undoubtedly, the defendants would also have required an applicant to possess the ability to understand the English language, although that ability was not listed as a specific job requirement. However, that does not mean, and certainly Coleman would not seriously argue, that a person alleging discrimination on the basis of national origin could demand that the agency permit him to prove that he could perform the job with the aid of an interpreter provided by the agency.

In evaluating the actions of the

defendants, the expense necessarily involved in providing the reader sought by Coleman for the job of research analyst cannot be considered irrelevant. It must be remembered that the facts do not reveal any general refusal by the defendants to hire blind persons or to provide readers. In fact, Coleman had been satisfactorily employed by the agency for more than two years, during which time he was provided at least a part-time reader. The undisputed facts indicate that the defendants were fully familiar with Coleman and the manner in which he had performed the job of law clerk, that Coleman's application was individually considered and that because of the nature of the duties of a research analyst, Coleman's inability to read, among other things, rendered him less qualified to perform that job than the person ultimately appointed. Under the circumstances of this case, the employment decision reached by the defendants was rationally based upon all of the relevant factors and was not a clear error of judgment. Consequently, we agree with the District Court that the actions of the defendants were not arbitrary or capricious.

For the foregoing reasons, we find that the entry of summary judgment in behalf of the defendants was proper. Accordingly, the judgment of the District Court is AFFIRMED.

APPENDIX C

MAY TERM - May 17, 1979

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges, and Honorable H. Dale Cook, District Judge

MICHAEL E. COLEMAN, Plaintiff-Appellant,	)	
vs.	)	No. 77-1133
GEORGE DARDEN, etc., et al, Defendants, Appellees.	)	

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth and Logan and District Judge Cook, to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no

member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Apppellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS,
Clerk

Appendix D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 76 M 686

MICHAEL E. COLEMAN)
)
Plaintiff,)
)
v.)
)
GEORGE DARDEN, et al) ORDER
)
Defendants.)

Upon the hearing held on November 15, 1976 on the defendants' motions to dismiss and for summary judgment and upon the conclusion that the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701(8), 791(b) and 794 does not create a private cause of action for remedy and that Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), et seq. affords no basis for the relief claimed in the complaint herein and it also appearing that the motion for summary judgment should be amended and supplemented as directed by the Court at the time of the hearing, it is now

ORDERED that the defendant shall have twenty (20) days within which to file an amended and supplemental motion for summary judgment and the plaintiff shall have ten (10) days thereafter in which to file affidavits or other appropriate pleadings pursuant to Rule 56 of

the Federal Rules of Civil Procedure.

Dated: November 16, 1976.

BY THE COURT:

Richard P. Matsch, Judge
United States District
Court

Appendix E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 76 M 686

MICHAEL E. COLEMAN,

Plaintiff,

v.

GEORGE DARDEN, Individually, and in his representative capacity as Regional Director of the Denver Litigation Center for the Equal Employment Opportunity Commission; ANNIE CLAY, Individually and in her representative capacity as Administrative Officer for the Equal Employment Opportunity Commission; and JOHN FORD, Individually and in his representative capacity as Senior Research Analyst for the Equal Employment Opportunity Commission, ETHEL BENT WALSH, individually and as Acting Chairman of the Equal

MEMORANDUM AND ORDER FOR SUMMARY JUDGMENT OF DISMISSAL

Employment Opportunity Commission,

Defendants.

Upon the plaintiff's complaint, the defendants' motions and the affidavits which have been filed, together with the statements of counsel at a hearing held on November 15, 1976, the Court finds and concludes that there are no genuine issues as to any material facts and this case is, therefore, appropriate for disposition under Rule 56 of the Federal Rules of Civil Procedure.

Michael Coleman is a 29 year old white male who has been totally blind since 1960. He received a B.A. Degree in political science from Louisiana State University in 1970 and a J.D. Degree from the University of Denver Law School in 1974.

Mr. Coleman was employed by the Denver Regional Office of General Counsel, Equal Employment Opportunity Commission from January 1, 1974 to January 1, 1975 as a case analyst on a part-time basis and from January 1, 1975 to March 1, 1976 as a law clerk at a GS-11 level on a full-time basis. During his employment as a law clerk the plaintiff was provided with the assistance of a reader. On March 1, 1976 Mr. Coleman's employment was terminated for failure to gain admission to the bar.

There had been a practice to employ GS-11 attorneys who were terminated for failure to gain admission to the bar as

legal research assistants when openings became available.

Knowing that he would be terminated March 1, 1976, the plaintiff did apply for a GS-11 research assistant position in November, 1975. The plaintiff was not hired and the appointment to that position went to a female who was not visually handicapped. The job description for an EEOC research assistant described duties comparable to those of a paralegal specialist for which the United States Civil Service Commission issued classification and qualification standards by Bulletin No. 930-17, dated August 11, 1975. Attachment No. 1 to that bulletin described physical requirements, including the ability to read printed material the size of type-written characters and permitting the use of corrective lenses.

The appropriate officials of the EEOC adopted an affirmative action plan for physically handicapped people in compliance with 29 U.S.C. § 791(b).

By the order entered on November 16, 1976, this Court concluded that the Rehabilitation Act of 1973, as amended, does not create a private cause of action and that Title VII of the Civil Rights Act of 1974, as amended, affords no basis for relief for discrimination because of a physical handicap. The plaintiff has withdrawn his claim for mandamus relief for adoption of an affirmative action program because the defendants have shown an adequate compliance with this statutory requirement.

The only matter now to be decided is whether there is any basis for the plaintiff's claim that the defendants have violated his rights under the Fifth Amendment due process clause by refusing to give him an opportunity to demonstrate his ability to perform the work of the position which he sought. In support of that claim, plaintiff's counsel urged consideration of the cases holding that conclusive or irrebuttable presumptions are constitutionally impermissable bases for governmental action. Thus in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974) the Supreme Court held that mandatory termination provisions for pregnant teachers violated the due process clause of the Fourteenth Amendment because they relied upon unwarranted conclusive presumptions which burdened constitutionally protected liberties. In Vlandis v. Kline, 412 U.S. 441 (1973) the due process clause of the Fourteenth Amendment was held to prevent the State of Connecticut from using an irrebuttable statutory presumption that the legal address of a student established his residency for purposes of his tuition status at a public school.

Those and similar cases are not controlling here. It is conceded in the plaintiff's affidavit that he required the services of a reader in his prior employment with the EEOC and that the services of a reader would be required in the position of research assistant. It is not arbitrary or capricious for a government agency to establish physical requirements which are job related and there can be no

question here that sufficient visual acuity to enable the employee to read has a direct relationship to the job of assisting lawyers in the preparation of evidence and data in discrimination investigations.

Accordingly, the agreed facts do not support the plaintiff's claim for relief and it is

ORDERED that the clerk shall enter judgment for the defendants and this civil action shall be dismissed.

Dated: January 19, 1977.

BY THE COURT:

Richard P. Matsch, Judge
United States District Court

Appendix F (1)

MERIT PROMOTION PROGRAM

ANNOUNCEMENT
NUMBER 134-75

OPEN: October 30, 1975
CLOSED: November 28, 1975

RESEARCH ANALYST, GS-301.1-11

$16,255 to $21,133 per annum. Position is located in the office of the General Counsel, Denver Regional Litigation Center, Denver, Colorado.

Area of Consideration: EEOC - Wide.

Duties: Incumbent is responsible for performing a variety of duties to support a team of attorneys preparing for trial. Incumbent independently reviews, and analyzes case files of average difficulty received from District Offices alleging discriminatory employment practices based on race, color, religion, sex, or national origin filed under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. Analysis of cases entails a summary of the charges, itemization of relevant undisputed facts collected, statement of facts germane to respondents' defenses and a critical analysis of the findings. Researches and analyzes relevant case precedents and statistical and socio-economic data for inclusion in the summary presentation.

Qualifications: Applicants must have

a minimum of at least 3 years of general experience in addition to 3 years of specialized experience.

General Experience - experience in administrative, professional, investigative, technical, or other responsible work which has provided a general background for the position.

Specialized Experience - experience which has (1) demonstrated skills and knowledge needed to research and analyze statistical and socio-economic data, (2) provided average knowledge of areas such as industrial employment procedures and general business practices, (3) moderate understanding of statistical methods, computer data, and similar disciplines as they relate to employment problems, and (4) ability to perform duties within a basic framework of legal principles and precedents of equal employment law.

Substitution of Education: Appropriate education may be substituted for the required experience.

Candidates must have had at least 6 months of qualifying experience comparable in difficulty and responsibility to that of the next lower grade or 1 year comparable to the second lower grade, in the Federal Service.

EEOC employees interested in applying for this position must submit a complete EEOC Form 114, Application for Job Vacancy, EEOC Form 183, a Promotion Qualifications Statement (SF-171 may be used in lieu of _____.

RESEARCH ANLAYST, GS-301.1-11

Form 183, if preferred, and a copy of their latest EEOC Form 173, Employee Performance Appraisal to: Personnel Division, Room 3214, 2401 E. Street, N.W., Washington, D.C., 20506, Attention: Recruitment and Employee Relations Branch. Mailed applications must be postmarked no later than the closing date indicated above. Standard Form 171, Personal Qualification Statement, in the Employees Personnel Folder, will not be used for Merit Promotion Plan purposes. Outside applicants must submit Standard Form 171 and a copy of their most recent performance appraisal. Civil Service Status is required. Applicants will not be accepted for consideration under this announcement from persons who do not have Civil Service Status. All candidates will receive consideration without regard to race, creed, sex, age, religion, or national origin. Applications submitted in response to this vacancy announcement become the property of the Personnel Division.

APPENDIX F(2)

POSITION DESCRIPTION
Research Analyst

INTRODUCTION:

Position is located in the regional litigation center, Office of General Counsel, Equal Employment Opportunity Commission. The Office of General Counsel is authorized to litigate cases involving violation of Title VII in an effort to eliminate discriminatory employment practices based on race, color, religion, sex and National origin. The regional litigation center is responsible for all phases of case review, preparation, litigation and/or settlement instituted by the Commission in the District Courts of the U.S. within their respective jurisdictions under the Civil Rights Act of 1964, as amended.

1. Incumbent is responsible for performing a variety of duties to support a team of attorneys preparing for trial. Incumbent independently reviews, and analyzes case files of average difficulty received from District Offices alleging discriminatory employment practices based on race, color, religion, sex or National origin filed under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. Some travel is required in performance of these duties.

PRINCIPAL DUTIES AND RESPONSIBILITIES:

2. Receives investigative case files of more than average difficulty as assigned, for use of the attorney in evaluating the litigative potential of the respective case. The cases often involve more than average size employers and labor unions in the litigation region and/or issues of more than average complexity. Analysis of cases entails a summary of the charges, itemization of relevant undisputed facts collected. Statement of facts germane to respondents' defenses and a critical analysis of the findings. Any insufficiencies noted during this analysis will be rectified for the attorney, to provide as complete a summary as possible to determine the litigation value of the case.

3. Researches and analyzes relevant case precedents and statistical and socio-economic data for inclusion in the summary presentation. The issues involved (seniority systems, selection criteria, statistical evidence, availability of minorities or women in the relevant labor market, union hiring hall procedures, etc.) require the marshalling of data, documents and testimony to establish the government's case and meet the defenses of employers and labor unions. These cases will also involve issues that are frequently the center of substantial critical public attention and have a major impact on the employment opportunities for minorities and women in an entire community.

4. The review, analysis, evaluation and preparation of the material required to effectively aid the attorney in litigating cases will require the application of a variety of tasks based on an average knowledge of areas such as industrial employment procedures and general business practices, Commission rules and regulations, and precedent cases, as well as a moderate understanding of areas such as statistical methods, computer data, industrial psychology, and economics, as those disciplines relate to employment problems.

Develops work sheets for compilation of statistical data utilizing recognized statistical procedures and techniques in evaluating data. Interprets computer formats and printouts and is knowledgable with respect to computer service companies and their capabilities in compiling statistics. Compiles comparative labor force data and analyzes defficiences. (sic) Prepares comparative analysis on various economic indicators such as financial data, growth potentials, turnover rates, etc., between regional areas, between industries within a region, between companies and/or individual plants. Studies economic trends on a national and/or regional level as they affect cases and prospective remedial provisions.

At the direction of appropriate attorneys, performs necessary functions in order to obtain needed data to develop evidence for trial.

Evaluates seniority systems or labor referral systems for tacit testing

procedures that discriminate. Examines historical testing patterns or procedures by an employer. Analyzes and evaluates validation studies for generalities, ambiguities or inconsistencies that highlight the ineffectiveness of the study.

Assists with relevant factual material in the preparation of all phases of materials required for discovery, including interrogatories, subpoenas, depositions, production of documents, etc. May appear in court to testify with respect to statistical techniques used. Under the direction of the attorney may assist in interviews and in the preparation of affidavits of charging parties and witnesses in order to obtain evidence relevant to the allegations of discrimination and to ascertain the scope and degree of the violations of Title VII. May assist Attorneys in the preparation of witnesses.

Under the direction of the attorneys in charge of the case, aids in the preparation of remedial orders including computation of back pay awards and other provisions for eliminating discriminatory employment procedures.

As assigned, may assist in factual prepartion (sic) for pre-suit settlement negotiations in simple cases, obtaining assistance from the group leader as necessary. Submits reports to supervisor as required. Performs other related duties as assigned.

SUPERVISION AND GUIDANCE RECEIVED:

Receives overall supervision from the supervisory Attorney and general supervision from the group leader. May receive closer technical guidance in resolving problems of unusual complexity or when assigned to cases of greater difficulty. Refers to guidelines in the form of applicable legislation, EEOC manuals and directives, other EEO Agency directives and applicable issuances (e.g., OFCC, NLRB, etc.), EEOC Precedent Decisions, court decisions, commercial legal publications and other pertinent reference and regulatory materials. Completed work is reviewed for accuracy, soundness of judgement, adequacy of documentation, validity of conclusions and conformance with instructions, prescribed methods, procedures and policies.

APPENDIX G

AFFIDAVIT OF MICHAEL E. COLEMAN

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

Michael E. Coleman, affiant herein, being duly sworn on oath, deposes and says that:

1. Affiant has been blind since 1960. Affiant received a B.A. degree in Political Science from Louisiana State University in 1970, and a J.D. Degree from the University of Denver in 1974. Affiant is fluent in French, German and Spanish.

2. Affiant was employed at the Denver Regional Office of General Counsel ("Denver Office"), Equal Employment Opportunity Commission ("EEOC") from January 1, 1974, to March 1, 1976. Affiant was hired by the previous EEOC Director, Mr. Peter Sanchez Navarro. From January 1, 1974, to January 1, 1975, Affiant worked as a case analyst on a part-time basis at a GS-7 level; from January 1, 1975, to March 1, 1976, Affiant worked as a law clerk at a GS-11 level on a full-time basis. During the period Affiant worked as a law clerk, Affiant was provided reader assistance.

3. During the period from January 1, 1975, to March 1, 1976, Affiant attempted to pass the Colorado Bar examination, but was unsuccessful. According to the conditions of the GS-11 appointment, Affiant understood that if he was

not admitted to the bar within 14 months, he would be terminated. On March 1, 1976, Affiant was terminated for failure to gain admission to the bar.

4. During the summer or fall of 1975, Affiant was informed by means of a document, which Affiant believes to be the minutes of one of the senior staff meetings, that all GS-11 attorney appointees who were terminated for failure to gain admission to the bar would be given first preference in filling any future legal research assistant positions.

5. In approximately November of 1975, in reliance on the aforementioned senior staff policy, Affiant applied for a GS-11 research assistant position at the Denver Office in case Affiant was not successful on the bar, which position, Affiant understands, was the same grade and level as Affiant's former law clerk position wherein Affiant received reader assistance. Affiant, having read the job description for research analyst and being familiar with the duties described, is of the firm belief that, with the assistance of a reader, he could perform the tasks in as competent and satisfactory a manner as he did those of law clerk and would be able to demonstrate his skills if given the opportunity.

6. Also in the month of November, Affiant spoke directly to Mr. George H. Darden, associate general counsel of the Denver Office, about Affiant's possible termination as a result of the bar

requirement. At this meeting Affiant also pointed out to Darden the statistical disparity of the handicapped in contrast with the statistical disparity of the employment of minorities on which the EEOC bases much of its litigation. Darden acknowledged the validity of this comparison.

7. Sometime in the middle of February, 1976, Affiant received a letter from Darden stating that the GS-11 research assistant position had been filled. Affiant has been informed that this person, unlike Affiant, has not been graduated from a law school.

8. About two days after receiving this letter, Affiant consulted Miss Catherine Shattuck, the grievance officer for the Denver Office, about this situation. Miss Shattuck stated that she would accept only a grievance based on race, sex, religion, national origin or age. She specifically maintained that the rights afforded the handicapped under the Rehabilitation Act of 1973, 29 USC §701 et seq., and under 5 CFR §713.401, could not be included within the grievance procedure which she administered. Affiant inquired if there were any administrative procedures to be exhausted regarding the issue of handicap. Miss Shattuck consulted the Civil Service Commission, which informed her that no administrative remedy existed, and that therefore no procedure need be exhausted. She maintained that, because there was no grievance procedure for the issue of handicap, either through the EEOC or

through the Civil Service Commission, the handicapped issue could only be raised in the courts.

9. The informal consultation produced no resolution. Darden maintained that the expense of reader assistance would not justify the hiring of Affiant to fill such a position.

10. Approximately 3:00 p.m. on Friday, February 27, 1976, Affiant met with Darden and attempted to explain to him the problem. Darden maintained that Affiant's problem was going to be handled through the grievance procedure. Affiant responded that the grievance procedure did not include the handicap issue. To this Darden was completely unresponsive.

/s/Michael Coleman
Michael E. Coleman

Subscribed and sworn to before me by Michael E. Coleman this 17th day of December, 1976.

Witness my hand and official seal.

My commission expires: December 17, 1979

/s/Nancy Gardner
Notary Public

APPENDIX H

AFFIDAVIT OF WILLIAM C. WILDBERGER, II

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

William C. Wildberger, II, first being duly sworn, deposes and says:

I am employed at the Equal Employment Opportunity Commission, Denver Regional Office of General Counsel and served as an Assistant Regional Attorney at all times relevant hereto. Included in my duties was the supervision of Michael Coleman, Law Clerk, who was hired by the previous Director, Peter Sanchez-Navarro. From this experience, I can state that he was extremely bright, competent and performed his duties in an exemplary professional manner.

Mr. Coleman was forced to resign his law clerk position having not passed a bar examination within the fourteen month period allowed by this agency. He had applied for a Legal Research Assistant position, and his name appeared on the certification list for this position.

Mr. Joe Simms, a staff attorney, has a similar physical handicap as that of Mr. Coleman. He has been furnished with a full time reader (Dona Hultman) for most of the time he has been on the staff. Mr. Coleman was not so fortunate and had to rely on reader assistance on a part time basis from Georgia Guilfoil, an LRA assigned to my team. Mr. Sims'

reader was not hired by Mr. Darden, the present head of the office.

Since the duties of Research Analyst are similar in most significant respects to the duties Mr. Coleman was performing as Law Clerk, it is my opinion that Mr Coleman, with the assistance of a full time reader, could have well performed the duties of the Research Analyst position for which he applied.

Moreover, the position of Paralegal Specialist, as outlined in the BTN, No. 930-17 dated August 11, 1975, entails more extensive and different duties than does the job of Research Analyst, particularly in the area of statistical evaluation, the assembly of evidentiary material, and the extensive use of microfilm. The job of Paralegal Specialist is not identical to the job of Research Analyst, either in written job description form or as the jobs are actually performed. There are duties required of Paralegal Specialist which may justify a requirement that an applicant have the physical ability to read, whereas the job of Research Analyst, not requiring those same duties, could be competently performed by a person with a visual handicap.

/s/ William C. Wildberger, II
William C. Wildberger, II

Subscribed and sworn to before me this 7th day of January, 1976.

Witness my hand and official seal.

My commission expires: 12/17/79

/s/Nancy Gardner
Notary Public

APPENDIX I

AFFIDAVIT OF PETER SANCHEZ-NAVARRO

STATE OF TEXAS /
/ SS
COUNTY OF HARRIS /

Before me the undersigned authority on this day personally appeared Peter Sanchez-Navarro, Jr. who by me first being duly sworn deposes and says the following:

My name is Peter Sanchez-Navarro, Jr. I am an Attorney at Law and I am presently engaged in the Private Practice of Law at 1434 W. Alabama, Houston, Texas. I received my license to practice law in Texas on April, 1952.

I am a member of the American and Texas Bar Associations and I am admitted to practice before the following Federal Courts:

1.) Supreme Court of the United States (May 2, 1957);

2.) United States Court of Appeals (5th Cir.) (June 6, 1956);

3.) United States Court of Military Appeals (May 4, 1957);

4.) United States District Courts Southern (Oct. 2, 1953) and Northern Districts of Texas (July 28, 1975)

I was awarded a degree of Bachelor of Laws from the University of Texas in May, 1952.

In addition to having been engaged in the practice of law in the Houston, Texas area since 1952, I have been employed as an attorney in the following agencies or institutions:

1966-1971 Houston Legal Foundation as Chief of Law Reform and Litigation (This was the Houston area legal services project);

1972-1976 Equal Employment Opportunity Commission Denver Regional Litigation Center

I am well acquainted with Michael E. Coleman, a Plaintiff in Civil Action No. 76-M-686, United States District Court for the District of Colorado.

Michael Coleman was first interviewed by me sometime in the late Autum (sic) of 1973 while I held the post of Acting Regional Attorney for the Denver Regional Litigation Center EEOC. My impressions of Mr. Coleman, then a last year law-student at Denver University Law School, was his ability to express himself on the legal subjects with a high degree of alacrity, notwithstanding his very articulate summations on the subject of Title VII, of the Civil Rights Act of 1964, which was then being developed.

I was prompted to recommend his employment as a law-student clerk very early in the year 1974 and sometime in the month of February, or soon thereafter Mr. Coleman was assigned to duties at the Denver Regional Litigation Center.

Mr. Coleman, being totally blind, was provided with or shared a reader during this Student Clerk period.

Upon Mr. Coleman's graduation from Denver University Law School, I again recommended Mr. Coleman's appointment to a tenured position with Equal Employment Opportunity Commission, Denver Regional Litigation Center, and he was employed in this capacity for a maximum period not to exceed 14 months. His duties entailed working with the attorney staff and the then called Legal Research analyst in the preparation of case files for evidentual (sic) submission for litigation approval. Again Mr. Coleman during this period was provided or shared a reader, and from my observations and comments from members of the staff, Mr. Coleman's contribution to "Presentation memos" and case closures were above the average.

This is likely, because of Mr. Colemans (sic) facility to the English language.

In addition to his other attributes, which I discovered, beginning with my first interviews with Mr. Coleman, this gentleman has also mastered the following languages:

(1.) French (2.) German
(3.) Spanish & (4.) Russian

To me, the knowledge of Spanish was an important asset since the Denver Regional Litigation Center, served 11 states, 3 of which, and possible (sic) a 4th, having large populations of Spanish speaking persons, whose national origin was a feature in many outstanding, cases needing review by the Equal Employment Opportunity Commission.

During my tenure as Acting Regional Attorney I was never dissatisfied with Mr. Coleman's work product and the quality of his work.

Equating the overall experience Mr. Coleman obtained during his employment with the Equal Employment Opportunity Commission with his intellectual expertise, Mr. Coleman would, in my opinion rate very high in ranking applicants for positions sought within the Commission namely, Research Analysts or Paralegal Specialists.

I served as Acting Regional Attorney at the Denver Regional Litigation Center, EEOC from October 1, 1973 until on or about January 26, 1975. I seperated (sic) from the Equal Employment Opportunity Commission on January 3, 1976 as an Associate Regional Attorney - (Supervisory).

/s/Peter
Sanchez-Navarro, Jr.

Peter Sanchez-Navarro,Jr.

Sworn and subscribed on this the 3rd day of January, 1977.

Notary Public in and for
Harris County, Texas

My Commission Expires:
June 1, 1977

APPENDIX J

AFFIDAVIT OF GEORGIA C. GUILFOIL

I have known Michael Coleman for 2 years. First as a Research analyst, GS-7 part-time employee on the 6th floor of DRLC while I was in an Administrative Assistant position on the same floor and then for the past year in the capacity of a Law Clerk, GS-11, in a Schedule A appointment on Wm. Wildberger's team to which both Michael and myself were assigned in January, 1975. In addition to my regular duties as a research assistant for the 4 or 5 member team to which I was assigned, I was given the assignment of reading and writing for Michael for the past year. He is blind and a very determined individual. His interest in Title VII cases and knowledge on same would in no way reflect that he is handicapped as he is well read and keeps himself informed on such subjects.

In the past year he has made attempts to pass the Colorado bar as well as the North Dakota and Iowa Bar examinations in order to continue in Title VII work but to date he has not been successful. When I last talked with him he mentioned again that he intended to try to be accepted for the Colorado bar examination scheduled for summer of '76 in order to continue with his goals in the law profession.

While I was working with Michael he mentioned that if he was unsuccessful in passing the latest bar examination he

took, that he would like to know of existing vacancies in the LRA field for which he might bid. This was only a natural move on his part to protect his future with the DRLC as he had been read the minutes of a Senior Staff Meeting of sometime last summer or fall which indicated that a discussion had been held between Regional Attorneys and Regional Director's (sic) at a meeting they had attended that they were concerned about the number of law students or graduates who were unable to pass a bar examination and that they might have to be given consideration for RA positions in the EEOC offices. Knowing that his 14 month appointment as a Law Clerk would expire in March of '76, he felt if he could keep on the payroll in a RA or similar position, it would given him an income as well as a chance to try the Colorado bar examination again in the summer of '76. At about the same time the announcement for the RA, GS-11 position came out, there also appeared an article in the Rocky Mountain News that President Ford was urging or insisting Federal Agencies do do everying possible to employ the handicapped, so this clipping was attached to Michael's request or bid for the GS-11RA position, as was a cover letter to indicate his willingness and determination to stay on the DRLC payroll and continue in Title VII work. Then we heard he had made the GS-11 LRA register which was sent to the DRCL from headquarters personnel, however I never did see the register nor do I remember who told me that Michael had made the top 5 candidates from which a selection would be made. Next thing we

heard was that a female from the San Antonio District Office had been selected for the position and Michael received a letter stating he had not been selected. It was at this time Michael decided to inquire of EEOC grievance procedures and how to go about filing a charge of discrimination within the EEOC. He talked with Ms. Shattuck, our EEO Counsellor and from thence came the complaint which I typed for Michael and submitted to Ms. Shattuck for handling.

I do not recall a memo on the fact that Mr. Sibal would discuss problems with DRLC individuals while Mr. Sibal was here in February, '76 I believe. As I remember, Mr. Darden informed the staff at an earlier meeting before Mr. Sibal's arrival that Mr. Sibal would be available for discussion of important matters (through proper arrangements with Mr. Darden's secretary) should he (Mr. Sibal) have the time for these discussions after his other business was taken care of. Then later (next day as I remember) it was announced by Mr. Sibal when he met with DRLC staff, that due to an illness he had incurred while in Denver, Mr. Robinson would be available for these special discussions to be made through appointment with Mr. Darden's secretary. Michael made an appointment to see Mr. Robinson but was informed by Mr. Darden's secretary that Mr. Robinson would not have time to see anyone for these special discussions or problems due to his schedule so Michael never really got to discuss his problems with either Mr. Sibal or Mr. Robinson at that

time. To the best of my knowledge, neither Mr. Sibal nor Mr. Robinson had conversations privately with anyone scheduled for these individual problem type discussions, however Michael felt that such a discussion with either of them at that time might have done some good for all parties concerned.

My feelings on Michael's problems are that EEOC does need to do something about employing the handicapped, as other agencies are trying to do, to keep in line with our own program. Michael was rated eligible for the RA, GS-11 position and then turned down because of his handicap just when he was at his lowest after not having been successful in passing the bar examinations he had taken within the last year. Even though employing him in the RA capacity would have meant hiring a full-time or part-time employee to read and write for him, it is hard for me to conceive of the transfer of the female from the San Antonio District Office at the government's expense to the DRLC and then possibly expenses again to Dallas (should the move happen) any more rewarding nor less expensive to the Commission than it would have been to put Michael in the position, since he was already here and knew the work, even though it involved hiring a reader/writer for him. The female had a job and Michael is without one as a result of the selection made.

/s/ Georgia C. Guilfoil

APPENDIX K

AFFIDAVIT OF GEORGE H. DARDEN

RE: MICHAEL E. COLEMAN

1. Upon receipt of three (3) Promotion Eligibility Listings--two of status eligible candidates and one of non-status candidates, I asked Annie Clay, Administrative Officer, (black female) and John Ford, Senior Research Analyst, (while male) to evaluate the applications and let me have their recommendation as to the person best qualified to fill the vacancy.

2. I was informed by Annie Clay later that Personnel had inadvertently left the name of Delphia Nash off the certificate and we would receive her application and should consider her along with other candidates for the position.

3. The selection panel discussed with me, what they considered the strength and weakness of each candidate. Upon my specific request, it was pointed out that the duties of the Research Analyst, GS-11, position, could not be performed by a person handicapped thru (sic) blindness, but would rather be performed by a second employee if the blind person was hired. (A copy of the position description is attached).

4. The candidates recommended to me were:

Dorothy Hughes
Delphia Nash
Ilga Pakalns

I selected Delphia Nash to fill the vacancy, because I felt she was the best candidate to fill the position.

5. On approximately, February 25, 1976, Michael Coleman came to see me. Michael stated that he was disturbed because Mr. Sibal (the General Counsel) and Mr. Robinson (the Associate General Counsel for Litigation Division) would not speak to him as formally requested. I told him that Mr. Sibal had laryngitis and Mr. Robinson was very busy and had no time. Michael expressed concern over the fact that he was refused a copy of a memorandum which allegedly expressed an office policy to give priority to those law clerks in the office who failed the bar examination in filling Research Analyst's positions. My response to Michael was that I knew of no such policy and therefore denied the existence of any such memorandum. I suggested that if he had a specific date or copy of said memorandum, we would certainly produce the original. He could not give any specific dates. I later learned that the memorandum he was referring to was one dated October 21, 1975, (copy attached) and in my opinion it does not state what he purported it to state. In any event, the affiant states that there is no such policy, never was, and never will be unless my superiors dictate.

6. There has never been a similar

situation since I was assigned to this office. Claimant's reference to a similar situation is misplaced if, as I suspect, he is referring to the Douglas Vasquez' matter. Douglas Vasquez' was given fourteen (14) months to pass the bar, and terminated when he failed to pass the bar within that time frame. However, Mr. Vasquez was rehired as an attorney when he passed the bar.

7. Since the hiring freeze was lifted, we have received two Promotion Eligible Listings for Research Assistant/ Analyst positions. All candidates on the Listing dated 11/4/75 were female. On the Listings dated 12/18/75, three (3) of the seven (7) candidates were male, one was certified as eligible the other two, one of which was Michael Coleman, had to be certified by the Civil Service Commission. In looking at the applications from the standpoint of best qualified to meet the needs of this office a female was selected.

I have read the above statement and I swear that it is true and correct to the best of my knowledge and belief.

/s/ George H. Darden
George H. Darden

APPENDIX L

AFFIDAVIT of ANNIE C. CLAY

Annie C. Clay, being first duly sworn according to law deposes and says:

1. I am the Administrative Officer of the Denver Regional Office of General Counsel, Equal Employment Opportunity Commission (EEOC).

2. In connection with Job Announcement 134-75 (Research Analyst) Mr. George Darden asked me to review and evaluate the applications of all qualified candidates who were referred to this office by the Office of Personnel, EEOC.

3. I reviewed and evaluated each and every such candidate, including Michael Coleman and Delphia Nash. I rated Ms. Nash as one of the tree (sic) best qualified, but did not rate Mr. Coleman as one of the three best qualified.

4. In reviewing and evaluating Mr. Coleman for the position of Research Analyst, I read his Standard Form 183 and his latest performance evaluation. These were the materials Mr. Coleman submitted in applying for the position.

5. Sometime prior to October 20, 1975, the Civil Service Commission Bulletin No. 930-17 of August 11, 1975 (attached hereto as Exhibit A) was forwarded to me by the office of Personnel, EEOC. That Bulletin has been in my possession to the present time and, at the time of reviewing and evaluating Mr. Coleman, I

was aware of the Physical Requirements in that Bulletin which require the ability to read printed material.

I certify that I have read the attached affidavit of 2 pages and have reviewed the 1 attachment. I affirm that the foregoing affidavit is true to the best of my knowledge and belief.

DATE: 12/8/76 /s/Annie C. Clay
Annie C. Clay

SUBSCRIBED AND SWORN TO BEFORE ME this 8th day of December, 1976.

My Commission expires September 19, 1979.

/s/Carol A. Larsen
Notary Public

APPENDIX M

AFFIDAVIT of JOHN J. FORD

John J. Ford, being first duly sworn according to law, hereby deposes and says the following:

1. I am a Senior Research Analyst at the Denver Regional Office of the General Counsel, Equal Employment Opportunity Commission.

2. In connection with the position of Research Analyst for which Michael Coleman applied, Mr. George Darden asked me to review the applications of all candidates qualified for the position.

3. I reviewed the applications of each and every such candidate, including Michael Coleman and Delphia Nash. I rated Delphia Nash as one of the three best qualified candidates for that position. I did not rate Michael Coleman as one of the three best qualified.

4. In evaluating Michael Coleman for the position of Research Analyst, I read the materials he submitted, namely a Standard Form 183 and his latest performance evaluation.

5. In my opinion the duties of a Research Analyst (a position description is attached hereto as Exhibit A), include research and analysis of statistics, preparation of charts and folders, and development of work sheets and involves accompanying an attorney to hearings to assist in the selection and maintenance

of statistical data and documents. A Research Analyst may be called upon to present display, and explain statistical data which he or she has complied.

I certify that I have read the attached affidavit of 2 pages and have reviewed the 1 attachment. I affirm that the foregoing affidavit is true to the best of my knowledge and belief.

DATE: 12/8/76 /s/ John J. Ford
John J. Ford

SUBSCRIBED AND SWORN TO BEFORE ME this 8th day of December, 1976.

My commission expires September 19, 1979.

/s/Carol A. Larsen
Notary Public

No. 79-224

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL E. COLEMAN, PETITIONER

v.

GEORGE DARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

LEROY D. CLARK
General Counsel

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BEATRICE ROSENBERG
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Washington, D.C. 20506

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 595 F. 2d 533. The opinions of the district court (Pet. Apps. C, D) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on February 23, 1979. A timely petition for rehearing was denied on May 19, 1979. The petition for a writ of certiorari was filed on August 10, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 29 U.S.C. 791(b) or 5 C.F.R. 713.401 imply a private cause of action against federal agencies to redress alleged physical handicap discrimination in employment.

2. Whether the court of appeals failed to consider petitioner's claim that he was denied employment by a federal agency in violation of non-discrimination requirements.

3. Whether the refusal to hire petitioner violated the Fifth Amendment.

STATEMENT

Petitioner has been totally blind since 1960. While he was attending law school in 1974, petitioner was employed as a part-time case analyst in the Denver office of the Equal Employment Opportunity Commission. After he received his law degree, petitioner was promoted to the position of law clerk on January 1, 1975. The duties of this position included drafting opinion letters interpreting Title VII of the Civil Rights Act of 1964, reviewing EEOC contracts, providing legal advice and assistance in the preparation of briefs, and drafting administrative regulations and examining other regulations for conformance with Title VII. In performing this job, petitioner had the assistance of a reader (Pet. App. 5a-7a).

Petitioner was terminated from his job as law clerk on March 1, 1976, because he failed to pass the bar examination which was a requirement for his continued employment. In anticipation of his termination, petitioner applied for the different position of research analyst at the Denver office of the EEOC. The duties of a research analyst include gathering and analyzing statistical and socio-economic data, developing work sheets for compiling statistical data, interpreting computer formats and printouts, compiling comparative labor force data, assisting in the preparation of materials for discovery, and reviewing and preparing materials to aid attorneys in litigating cases (Pet. App. 6a-7a).

Petitioner's application for this position was one of seven applications referred to the Denver office by the Commission's personnel office for final selection. Respondents Annie Clay and John Ford, who reviewed the application, did not select petitioner as one of the three finalists for the job. Ms. Clay, who was familiar with petitioner's work at the Commission, stated that it was her judgment "that the duties of the Research Analyst, GS-11, position, could not be performed by a person handicapped through blindness, but would rather be performed by a second employee if the blind person was hired" (Pet. App. 55a).

Petitioner thereafter filed a grievance with the Commission, which was rejected. He then filed this suit, alleging that the Commission's decision not to hire him as a research analyst was improperly based on his handicap, in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Due Process Clause of the Fifth Amendment.

The district court held that the Rehabilitation Act of 1973 did not create an implied private right of action against federal agencies for claims of handicap discrimination (Pet. App. 24a). The court also held that, on the undisputed facts of this case, the Commission's actions did not violate the Fifth Amendment (Pet. App. 29a-30a):

> It is not arbitrary or capricious for a government agency to establish physical requirements which are job related and there can be no question here that sufficient visual acuity to enable the employee to read has a direct relationship to the job of assisting lawyers in the preparation of evidence and data in discrimination investigations.

The court of appeals affirmed. The court held that the Commission did not deny due process to petitioner by

creating an irrebuttable presumption that he could not perform the research analyst job because of his handicap (Pet. App. 13a):

> Whenever a person seeking employment is rejected on the basis of an application, there is necessarily a "presumption" that he would be unable to perform the job as satisfactorily as the person hired. Such an unsuccessful applicant could always contend that he should be permitted an opportunity to prove that he could adequately perform the job, despite his apparent lack of qualifications. Merely because such "presumptions" are a fact of business life does not mean that "trial periods" should be required for all, or even all handicapped applicants, and certainly not if an applicant's qualifications are individually considered in relation to legitimate job requirements. The undisputed evidence in this case is that Coleman was given such individual consideration.

The court also held that a private cause of action could not be implied against federal agencies under Section 504 of the Rehabilitation Act of 1973, because Section 504 applies only to a "program or activity receiving Federal financial assistance" (29 U.S.C. 794), and thus does not apply to federal agencies (Pet. App. 16a).

The court of appeals concluded, however, that petitioner had a cause of action under the Administrative Procedure Act to review the Commission's employment decision.[1] The court held that, on the undisputed facts of this case, the Commission's decision to hire an applicant other than petitioner was not arbitrary or capricious (Pet. App. 16a-17a).

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[1]The Commission did not argue in the court of appeals that employment decisions are not "agency action" subject to judicial review under 5 U.S.C. 702.

ARGUMENT

1. Petitioner contends (Pet. 7-15) that the court of appeals erred in failing to find a cause of action implied against federal agencies for discrimination on the basis of physical handicap in violation of Section 501(b) of the Rehabilitation Act of 1973, 29 U.S.C. 791(b),[2] or in violation of 5 C.F.R. 713.401(a).[3] This contention was not

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[2]Section 501(b) of the Rehabilitation Act of 1973, 29 U.S.C. 791(b), provides:

> Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

[3]5 C.F.R. 713.401(a) provides:

> In determining the merit and fitness of a person for competitive appointment or appointment by noncompetitive action to a position in the competitive service, an appointing officer shall not discriminate * * * on the basis of a physical handicap with respect to any position the duties of which may be efficiently performed by a person with the physical handicap.

This regulation was promulgated under 5 U.S.C. 7153, which provides:

> The President may prescribe rules which shall prohibit, as nearly as conditions of good administration warrant, discrimination because of physical handicap in an Executive agency or in the competitive service with respect to a position the duties of which, in the opinion of the Civil Service Commission, can be performed efficiently by an individual with a physical handicap, except that the employment may not endanger the health or safety of the individual or others.

raised by petitioner in the court of appeals and is therefore not properly presented for further review. See *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In the court of appeals, petitioner argued that the Rehabilitation Act generally—and Section 504 of the Act in particular—created a private cause of action to redress violations of its prohibitions. Although Section 501(b) of the Act was referred to at several points in petitioner's brief in the court of appeals (Br. 10, 11), these references were made in support of its contention in that court that a cause of action was created by Section 504 (see Br. 10-20). The court of appeals correctly addressed and rejected the latter claim, noting that Section 504 has no application to federal agencies because they are not recipients of "Federal financial assistance," 29 U.S.C. 794 (Pet. App. 16a).[4] The court did not consider any claim that a private action against federal agencies exists under Section 501(b) or under 5 C.F.R. 713.401(a) because no such contention was presented in that court.[5]

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[4]Petitioner has not challenged this ruling of the court of appeals.

[5]Even if an action were implied under Section 501(b) or 5 C.F.R. 713.401(a), it is apparent from the record in this case that no violation of these provisions could be proven. The statute directs the agency to adopt "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals," 29 U.S.C. 791(b). Nothing in petitioner's individual grievance suggests that the agency has not complied with this statutory requirement. Similarly, the regulation directs agencies not to discriminate on the basis of physical handicap "with respect to any position the duties of which may be efficiently performed by a person with the physical handicap," 5 C.F.R. 713.401(a). As the court of appeals observed (Pet. App. 20a), the Commission has

> provided readers for visually handicapped persons in the positions of law clerk and staff attorney, who have specialized training and skills not possessed by the ordinary reader, but [has] concluded that in the case of a research analyst, the duties would be performed by the reader and not by the visually handicapped person. (R. 116)[.] That conclusion seems reasonable in light of the announced duties of the position.

Because petitioner cannot "efficiently perfor[m]" (5 C.F.R. 713.401(a)) the duties of the position for which he applied, the Commission's refusal to appoint him to that position did not breach the regulation.

Moreover, as petitioner concedes (Pet. 7 n.1), the question whether Section 504 creates a cause of action against federal agencies for pre-1978 handicap discrimination lacks prospective significance. Section 504 of the Act was amended in 1978 to encompass activities of "any Executive agency" as well as activities of recipients of "Federal financial assistance." Section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955, 2982. The question whether this amendment to Section 504 creates a cause of action for post-1978 federal handicap discrimination is not presented in this case (see Pet. 7 n.1).

2. Petitioner contends (Pet. 20-24) that the court of appeals applied an erroneous legal standard in reviewing the Commission's employment decision under the Administrative Procedure Act. The court of appeals held that the agency's action was valid because, on the undisputed facts, it was not "arbitrary or capricious," 5 U.S.C. 706(2)(A). See *McNutt* v. *Hill*, 426 F. Supp. 990 (D.D.C. 1977). Petitioner does not dispute this conclusion, but contends instead that the agency's action was "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. 702(2)(C), and therefore invalid. In this regard, petitioner claims that the Commission's decision conflicted with a duty allegedly imposed by Section 501(b) of

the Rehabilitation Act of 1973 and 5 C.F.R. 713.401(a) (see note 5, *supra*) not to discriminate on the basis of physical handicap.

But in concluding that the Commission's action was not arbitrary or capricious, the court emphasized the very factors that refute petitioner's contention that the statute and regulation were violated (see note 5, *supra*). While the Commission has a responsibility to employ handicapped individuals for jobs which they can perform, it has no obligation to hire persons that cannot "efficiently perfor[m]" (5 C.F.R. 713.401(a)) the requirements of a position. For the reasons amply set forth by the court of appeals (Pet. App. 18a-21a), the agency was not required to hire an additional person to provide reading assistance to petitioner to comply with either the statute or the regulation (see note 5, *supra*). Cf. *Southeastern Community College* v. *Davis*, No. 78-711 (June 11, 1979).

3. Petitioner also argues (Pet. 15-20) that the Commission impermissibly utilized an "irrebuttable presumption" to deny him employment because of his handicap. This contention was properly rejected by the court of appeals (Pet. App. 9a-15a).

The Commission's decision not to hire petitioner was not based on an irrebuttable presumption. It was instead based on a consideration of petitioner's, and other applicants', qualifications for the competitive position for which they sought employment. Unlike *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974)—on which petitioner relies (Pet. 17)—the Commission has no general policy that operates to exclude a class of persons from employment. To the contrary, as the court of appeals observed (Pet. App. 13a), the undisputed evidence in this case reveals that petitioner's application was given

"individual consideration" in relation "to legitimate job requirements" (*ibid.*) and was not excluded from consideration because of his handicap.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Equal Employment Opportunity Commission

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[6]Petitioner argues (Pet. 18) that the court of appeals erred in suggesting that the irrebuttable presumption doctrine extends only to fundamental constitutional claims and "might" be inapplicable to handicap discrimination (Pet. App. 12a). Because the court concluded that the Commission's action was *not* based on an irrebuttable presumption, the dicta concerning the possible inapplicability of the doctrine in the context of handicap discrimination affords no basis for further review in this court. Cf. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 609 n.9 (1973).

DOJ-1979-10

In The

Supreme Court of the United States

No. 79-224

MICHAEL E. COLEMAN,

Petitioner,

vs.

GEORGE DARDEN, et al.,

Respondents.

PETITIONER'S REPLY BRIEF

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WHETHER 29 U.S.C. 791(b) AND/OR 5 C.F.R. 713.401(a) IMPLY A CAUSE OF ACTION AGAINST FEDERAL AGENCIES WAS RAISED IN PETITIONER'S COMPLAINT, EXPLICITLY RULED ON BY THE DISTRICT COURT, RAISED IN PETITIONER'S OPENING AND REPLY BRIEFS IN THE COURT OF APPEALS, AND SPECIFICALLY ADDRESSED IN ORAL AGRUMENT IN THE COURT OF APPEALS.

Respondents' opposition to this Court granting certiorari is based entirely on the theory that the implied cause of action issue was not raised in the Court of Appeals. This contention is a diaphanous attempt to justify the Court of Appeals' failure to address this issue and is a position clearly without any merit whatsoever.

First, Petitioner in his Complaint explicitly alleged an implied cause of action under 29 U.S.C. 791(b) and/or 5 C.F.R. 713.401.

Second, the District Court granted the Respondents' Motion to Dismiss Plaintiffs' claims under 29 U.S.C. 791(b), Section 501(b) of the Rehabilitation Act on the explicit grounds that 29 U.S.C. 791(b) does not, as a matter of law, imply a private cause of action against Federal agencies. (App. D to Petitioner's Petition)

Third, Petitioner's Opening Brief in the Court of Appeals stated in summary of issue number I that "the District Court erred in not implying a private

cause of action from the explicit prohibitions of the Rehabilitation Act, 29 U.S.C. 701(8), 791(b), and 794." The Brief quotes the language of 791(b) and discusses this section at length, (Opening Brief, p. 11). The Opening Brief also sets out 5 C.F.R. 713.401, and argues by analogy to other sections of the Rehabilitation Act which have been construed to imply a private cause of action to redress physical handicap discrimination.

Fourth, Petitioner's Reply Brief in the Court of Appeals stated in part:

> "Plaintiff's position is that the entire Rehabilitation Act of 1973, as amended, including Sections 29 U.S.C. 701(8) and 791(b), in conjunction with Civil Service Commission Regulation 713.401, and other implementing regulations, support an implied cause of action for physical handicap discrimination against federal employers" (Reply Brief, p.4)

Finally, Petitioner's counsel, in his oral argument before the Court of Appeals, clearly, repeatedly, and explicitly framed the issue in terms of whether 29 U.S.C. 791(b), and/or 5 C.F.R. 713.401 imply a private cause of action against Federal agencies.

CONCLUSION

Since it is clear and unmistakable that the issue of implied cause of action under 29 U.S.C. 791(b) and/or 5 C.F.R.

713.401 was raised throughout these proceedings by Petitioner and explicitly ruled on by the District Court, Respondents' sole basis for opposition is without merit and the Petition For Writ of Certicrari should be granted.

Respectfully submitted,

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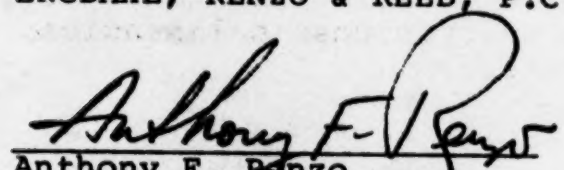

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